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Tuesday, May 16, 2006

Supreme Court weakens U.S. patents?

The United States Supreme Court in *eBay v. MercExchange* has held that, instead of applying a general rule that patent infringement leads to an injunction barring the infringer from using the patent, courts instead should, as in most other areas of law, apply the four-factor equity test used for deciding whether to order permanent injunctions. In other words, the plaintiff must show that:

> (1) it has suffered irreparable injury from the infringement,
> (2) monetary damages are inadequate to compensate for the injury,
> (3) the balance of the hardships warrants a remedy in equity (roughly speaking, that the plaintiff will be hurt more by lack of injuntion than the defendant will by the injunction), and
> (4) the public interest would not be disserved by a permanent injunction.

This holding overturns that of the U.S. Federal Circuit favoring the general rule that, subject to a few exceptions, injunctions should issue when there is infringement. The Federal Circuit generally hears all appeals in U.S. patent infringement cases. It has been a *de facto* supreme court of patents, since, at least until this year, the actual Supreme Court accepted patent appeals quite infrequently. If past history is any indication, the Federal Circuit will probably try to liberally interpret the Supreme Court's opinion to maintain the rules that it has championed. Here, it may try to read its rule of general injunctions into the four-factor test.

There are a number of clever arguments the Federal Circuit might accept in order to effectively revert to the general rule. It might favor the plaintiff with presumptions that each of the four factors are generally found in patent cases, or reason by analogy that where injunctions were issued in a similar case in the past, the four factors impliedly must have been found, and thus should also be found in the present case. This would allow the Federal Circuit to distinguish *eBay* as involving a particularly problematic variety of patents (business methods), or even just a particularly problematic instance such patents, and in effect keep applying the general rule to other kinds of patents.

Thus, given the structure of U.S. federal courts, where generally all patent appeals go through the Federal Circuit, the U.S. Supreme Court may have to take several more injunction cases involving different circumstances than *eBay* before it effectively overturns the ubiquitous use or threat of injunctions in U.S. patent cases.

The concurring opinions also suggest that Justices Thomas and Alito may be the swing votes in the Court's upcoming decision in

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Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

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Metabolite. Chief Justice Roberts will recuse himself. Stay tuned.

Posted by Nick Szabo at 12:25 PM

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